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Lena Foljanty

Cartographic Approaches and their Critique

The legal sociologist Ernst E. Hirsch once wrote, “The reception of foreign law is a social process. [...] Abstract sets of norms including juridical and meta-juridical conceptions, views, thoughts and ideas evolving around a legal rule, a statutory norm, and the concepts used in it” have to be “screened, filtered, amended, reshaped.” It needs to be decided if and to what extent the style, the spirit, or the language of the foreign law should be adopted. How to face persistence of old law and how to connect the new law with the life and work experiences of judges has to be considered. Legal scholars writing on the “processes of reception,” Hirsch criticized, were not reflecting on these dimensions.¹ He knew what he was talking about. As a Jewish immigrant, he had taught for almost two decades in Turkey before he was offered a chair at the institute for sociology of law at Berlin’s Free University in 1952.² Just like many other German intellectuals who had immigrated to Turkey after 1933, he became an actor in the reform process that was initiated by Atatürk in order to create a social order that followed a Western European model.³ He actively took part in the “modernization” of the legal system – a term that he disliked due to the connotations connected with it as he wrote later in a critical reflection.⁴ He learned quickly the Turkish language, taught com-

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¹ *Hirsch*, *Die Rezeption fremden Rechts als sozialer Prozeß* (1960), reprinted in: *Das Recht im sozialen Ordnungsgefüge. Beiträge zur Rechtssoziologie*, 1966, 89-105.

² Regarding Ernst E. Hirsch, see *Breunung/Walther*, *Die Emigration deutschsprachiger Rechtswissenschaftler. Ein bio-bibliographisches Handbuch*, Vol. 1, 2012, 204 ff.; and *Hirsch’s* autobiography: *Als Rechtslehrer im Lande Atatürks*, 2008.

³ On the role of German immigrants in Turkey, see, e.g., *Bozay*, *Exil Türkei. Ein Forschungsbeitrag zur deutschsprachigen Emigration in die Türkei (1933-1945)*, 2001.

⁴ *Hirsch*, *Die Einflüsse und Wirkungen ausländischen Rechts auf das heutige türkische Recht* (1954), reprinted in: *Das Recht im sozialen Ordnungsgefüge. Beiträge zur Rechtssoziologie*, 1966, 106 (ebd.).

mercial law as well as the philosophy and sociology of law, wrote textbooks and was responsible for drafting the Turkish Commercial Code enacted in 1956. Hence, he had personally experienced what he described in his writings as the complexity of the “slow amalgamation procedure,”⁵ in which foreign law “loses its ‘foreign’ character and becomes part of national law or at least impacts it.”⁶

When having a look at the main works in the field of comparative law, one quickly grasps what Hirsch’s critique was directed toward. Studies in comparative law were not particularly interested in understanding what Hirsch called the “utterly complex process”⁷ of implementing foreign law. They rarely discussed why a process had taken this versus that particular path. The research at that time was primarily driven by a cartographical interest: Which legal system had been most influential regarding the legal order under scrutiny? Can the intensity of the influence be estimated? The answer to these questions often served as a basis for classifying the legal system being examined in order to decide to which legal family it belonged.⁸ Should a non-European legal system that has taken up French law be conceived, for instance, as belonging to the Roman legal family, or should it rather be located within the legal family to which the surrounding legal systems belonged?⁹ Often, the ultimate aim of such studies was to estimate the impact that one’s own legal order had in the world.¹⁰

The Impossibility of “Legal Transplants”: Questioning a Question

Nowadays, the reflection of intercultural entangled processes of law-making has become a separate field of knowledge within comparative law.¹¹ Cartographical interests have been replaced by questions that deeply touch upon legal theory. In the 1990s, Alan Watson and Pierre Legrand respectively established milestones within this field, albeit, in very different ways. In his book *Legal Transplants* (first ed. 1974, 2nd ed. 1993), Watson argues that incorporating foreign legal norms or even large elements of foreign legal systems is an important factor for legal development. According to Watson, it is possible to transplant law and legal

⁵ Hirsch, (fn. 1), 92.

⁶ Hirsch, (fn. 4), 107.

⁷ Ibid.

⁸ Zweigert/Kötz, Einführung in die Rechtsvergleichung, 3rd ed. 1996, 63 ff.; a more critical view is offered by Glenn, Comparative Legal Families and Comparative Legal Traditions, in: Reimann/Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, 421-440.

⁹ With regard to Japan see Zweigert/Kötz, (fn. 8), 293. The question is insufficient in this respect, concerning the self-perception of a legal culture in a differentiating way, Zachmann, Does Europe include Japan? European Normativity in Japanese Attitudes towards International Law (1854-1945), in: Rg. 22 (2014), 228-243.

¹⁰ This question is still being asked, see Kischel (ed.), Der Einfluss des deutschen Verfassungsdenkens in der Welt: Bedeutung, Grenzen, Zukunftsperspektiven, 2014.

¹¹ See e.g. Reimann/Zimmermann (eds.), The Oxford Handbook of Comparative Law, 2006, especially Graziadei, Comparative Law as the Study of Transplants and Receptions, 441-475.

norms, even when large cultural differences need to be bridged.¹² Pierre Legrand vehemently criticized him,¹³ claiming that “transplants” were not possible. Foreign law that was being reformulated in new cultural surroundings would be nothing less than fundamentally *different* law. According to Legrand, it is an illusion to think that law would remain stable in its meaning throughout a transfer process. Meaning, Legrand argues, is attached to legal norms only within the cultural, historical, and epistemological framework in which they are interpreted and applied.

Both positions are quite extreme. Underlying the question whether “legal transplants” were possible or not, two fundamentally different understandings of how law functions clashed. Whereas Watson stressed the relative autonomy of law and presumed, on this basis, that a norm was “transplantable,”¹⁴ Legrand emphasized the contextuality of any law:

“A rule is necessarily an incorporative cultural form. As an accretion of cultural elements, it is supported by impressive historical and ideological formations. A rule does not have any empirical existence that can be significantly detached from the world of meanings that characterizes a legal culture.”¹⁵

Hence, talking about *legal transplants* would not be appropriate:

“No rule in the borrowing jurisdiction can have any significance as regards the rule in the jurisdiction from which it is borrowed.”¹⁶

In re-reading the debate, it becomes clear that the main concern was not so much the *possibility* or *impossibility* of “legal transplants.” Legrand did not doubt that foreign law was often used as a model in legislative processes. However, this was not his concern. By confronting Watson, he directed attention to the fact that law was a cultural phenomenon. The idea of simple transplantability was, in his opinion, not sufficiently taking this into consideration.¹⁷ At the same time, his argumentation invites us to reflect on issues, such as which research questions would be appropriate concerning law that was modeled after foreign law. Why are we discussing processes of law-making that were carried out under the influence of other legal cultures as a specific sort of law-making? How do they differ from common ways of law-making? If the meaning and functioning of a norm is dependent on their cultural and discursive framework, why are we interested in where they once originated and about the path they have taken?

¹² Watson, *Legal Transplants*, 2nd ed. 1993, 112 f.

¹³ Legrand, *The Impossibility of ‘Legal Transplants’*, in: *Maastricht Journal of European and Comparative Law* 4 (1997), 111-124.

¹⁴ See Ewald, *Comparative Jurisprudence (II)*, *The Logic of Legal Transplants*, in: *The American Journal of Comparative Law*, Vol. 43, No. 4 (1995), 489-510.

¹⁵ Legrand, (fn. 13), 116. Pointing in a similar direction, Ewald, *Comparative Jurisprudence (I)*, *What was it like to Try a Rat?*, in: *University of Pennsylvania Law Review*, Vol. 143, No. 6 (1995), 1889-2149.

¹⁶ Legrand, (fn. 13), 120.

¹⁷ Ewald (fn. 14).

Comparative Law: Searching for Metaphors

This is a fundamental, yet helpful question. Why are we interested in the path norms have taken, and why are we interested in the phenomenon of transfer? Asking these questions offers a possibility to reconsider the concepts that we use and to reflect on methodical questions.

First of all, on an empirical level, one cannot underestimate the significance of intercultural transfers in law-making processes. There are numerous examples in legal history. The expansion of European law during colonialism and the 19th century formation of nation states has left a lasting impact on many legal systems. Foreign legal materials were often taken as guides for constructing a new legal order in the aftermath of wars and regime changes. And finally, in today's attempts to harmonize law on an international level, the fact that law is transnationally entangled becomes evident. These insights lead to a number of questions: How does the process of taking up norms from a foreign legal order and implementing them in one's own exactly work? What are the pitfalls involved with such a process? How does such a process influence the law and how does it influence society? What are the blind spots associated with such a process?

Over the last two decades, debates in comparative law have been centered around these questions concerning the way transfer processes work, their operation, and their effects. The assumption that legal transfer is a simple process has been questioned time and again, and several scholars have criticized the term "transplant" as being too 'smooth.'¹⁸ Taking up the medical metaphor that underlies the term "legal transplant," they emphasized that organs could be either accepted or rejected by the body to which they were transplanted – taking up foreign law offers a much broader variety of reactions.

There are quite a number of alternatives to the term 'transplant' that have been proposed by comparativists. The term *transfer*, which has been in use since the 19th century, is still the most prominent.¹⁹ Moreover, a couple of new terms and metaphors are still being debated. Some of them emphasize the movement inherent to transfer process, for instance, terms like *circulation*, *migration*, or *traveling* of law; however, they do not discuss what happens when foreign law reaches its new context.²⁰ *Amalgamation*, *métissage*, *hybridization*, and *creolization* stress that law is influenced by various legal cultures in the course of traveling from one context to another, and, in the end, is a mixture of all these influences. Other terms not only reflect movement and characterize the law resulting from these movements but also aim at providing an idea about how the process of implementing foreign law works and what happens when foreign law and traditional legal orders meet. David Nelken and Johannes

¹⁸ E.g. Fögen/Teubner, Rechtstransfer, in: Rg 7 (2005), 38 (42).

¹⁹ Recently Frankenberg (ed.), Order from Transfer. Comparative Constitutional Design and Legal Culture, 2013, regarding the choice of concept in this volume see esp. Hendry, Legal pluralism and normative Transfer, 153-170.

²⁰ See Wagner, Kulturelle Übersetzung, Erkundungen über ein wanderndes Konzept, <http://www.kakanien-revisited.at/beitr/postcol/bwagner2.pdf>, 23.7.2009, 3.

Feest have highlighted the necessity to adapt foreign law to local contexts through the term *adaptation*.²¹ Günter Frankenberg emphasizes that legal norms have to be *de-contextualized* before being *re-contextualized* in a new place.²² Gunther Teubner, coming from a system theory-based perspective, uses the term *legal irritants* in order to make visible that integrating norms from a foreign legal order does not leave the normative structure of a legal system unaffected. Rather, it makes fundamental reconfigurations necessary that go beyond the norms in question.²³ Margrit Seckelmann sticks to the term *transfer* but notes, similar to Teubner, that in chemistry transfer always refers to an *irritation with an unpredictable outcome*.²⁴ Finally, Esin Örücü emphasizes that the foreign law and the ‘home’ legal system have to be brought into harmony. She makes a reference to music: in order to make a piece of music playable for another instrument, it has to be *transposed*.²⁵

This ongoing search for a viable metaphor demonstrates the need for the development of instruments and tools useful for analyzing the complexity of the transformations that a legal order faces when foreign law is taken up. In times of globalization and transnationalization, comparative law has become aware of the fact that the logics inherent to transfer processes have to be understood and the local adaptations have to be examined precisely in order to gain insights as to how these processes work. The concept of *reception* no longer proves to be sufficient;²⁶ it is too closely related to a research tradition that perceived legal transfer as a one-way street from *Europe* to the world, aiming at mapping and measuring influences, only to proudly point out the significance of European law as a model that has been well copied or unfortunately misunderstood. Hirsch’s attempt to reinterpret the concept of *reception* in order to make it fruitful for a more nuanced understanding was not powerful enough to break with this tradition.

²¹ Nelken/Feest (eds.), *The Adaptation of Legal Cultures*, 2001.

²² Frankenberg, *Verfassungsgebung in Zeiten des Übergangs*, in: *Autorität und Integration*, 2003, 115-135; *id.*, *Constitutional Transfer: The IKEA-Theory Revisited*, in: *International Journal of Comparative Law*, Vol. 8 (2010), No. 3, 563-579.

²³ Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, in: *Modern Law Review* Vol. 61 (1998), No. 1, 11-32.

²⁴ Seckelmann, *Ist Rechtstransfer möglich? – Lernen vom fremden Beispiel*, in: *Rechtstheorie* 43 (2012), 419-440; *id.*, *Clotted history and chemical reactions. On the possibility of constitutional transfer*, in: Frankenberg (ed.), (fn. 19), 36 (53).

²⁵ Örücü, *Law as Transposition*, in: *The International Comparative Law Quarterly*, Vol. 51 (2002), No. 2, 205-223.

²⁶ In its original meaning, the concept is directed to an active dimension of taking up, however in critique of the research tradition linked with it Duve, *Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive*, in: *Rg 20* (2012), 18 (49 f.). Differentiating *Avenarius*, *Fremde Traditionen des römischen Rechts*, 2014, 57 ff.

Cultural Translation of Law – A New Perspective?

New terms or concepts offer us the opportunity to pursue new paths of reflection and to develop new approaches. They trigger associations and generate new perspectives on a research object that seems to be familiar. They encourage posing questions that have not yet been formulated. In short: they make new heuristics possible.²⁷

On an etymological level, suggesting the term *translation* as another metaphor will not provide any strikingly new insights. In fact, *transfer* and *translation* have frequently been employed as synonyms throughout the history of language. According to the Grimm Brothers' German dictionary, there are indications that as early as the 16th century the verb *transferieren* had also been used in the sense "to move something from one tongue to another, to interpret." Later the nuances changed towards "German compositions such as *übertragen*, *versetzen*, *übersetzen*."²⁸ The act of transposing music was equally described by the term *transfer*.²⁹ At the same time, transposing also meant "to apply something to something different, to translate, to transform," and thus was not exclusively employed for phenomena in music.³⁰ From a historical perspective, these three terms were virtually interchangeable.

However, etymology is less crucial for the application of a metaphor. More important is whether its contemporary use offers the potential to shift research questions in a fruitful manner. And, in fact, I will show in the following how the concept of *cultural translation* enables a deeper understanding of processes of legal transfer by addressing aspects of the processes that are not sufficiently illuminated by most studies in the field of comparative law. They tend to concentrate on legal norms, institutions, and ideas, which means considering the processes that take place from a bird's-eye view. Legal norms, institutions, and ideas are seen as the agents that "*migrate*" and "*irritate*" and are *transferred*. Law seems to be constituted by different elements that can be isolated and that go on a journey.

In this way, transformations that occur at a "deeper structure of law"³¹ cannot be grasped. What does this mean? Law is not only shaped by norms, institutions, and ideas but also by structures of legal thinking that are rooted in tradition. It is also shaped by the possibilities, and limits that the language of law offers, as well as the professional habits of jurists and by the historical experiences inscribed into law, giving meaning to it regarding its political and

²⁷ See *Modéer*, *Lebende Ruinen des Rechts. Rechtliche Metaphern in postkolonialen und spätmodernen Rechtskulturdiskursen*, in: *Rg* 19 (2011), 228-236.

²⁸ *Deutsches Wörterbuch von Jakob und Wilhelm Grimm*, 11. Bd. I. Abt. I. Teil, ed. by *Lexner, Kralik* and *Arbeitsstelle des Deutschen Wörterbuchs*, 1935, col. 1238.

²⁹ *Deutsches Wörterbuch*, (fn. 28).

³⁰ *Schulz/Baseler/Institut für Deutsche Sprache* (eds.), *Deutsches Fremdwörterbuch*, Vol. 5, 1981, 408. A similar meaning is indicated for the verb „to transfer“, *ibid.* 388.

³¹ In a slightly different sense, *Wiethölter*, *Ist unserem Recht der Prozeß zu machen?*, in: *Honneth u.a. (eds.), Zwischenbetrachtungen. Im Prozeß der Aufklärung. Jürgen Habermas zum 60. Geburtstag*, 1989, 794 (797).

cultural context.³² All these factors set up the framework in which law is practiced, and it is this framework that starts shifting the moment that it comes into contact with foreign law.³³

I would like to show in the following that the metaphor of *translation* proves to be helpful for illuminating the complex interplay of these different layers of law when it comes to transfer processes. I will argue that the concept of *translation* draws our attention to the nuanced dynamics and processuality of transfer processes as well as to the constant shifts in the forms of legal thinking, acting, and perceiving that take place during these processes. It enables us to design investigative frameworks that critically reflect on the dichotomy of *giving* and *receiving*.³⁴

Translation Studies and Cultural Studies: Mutual Inspirations

In everyday language, translation is understood as the transfer of a word or text from one language to another. This process is often viewed, more or less, as a technical act that aims at putting the original into the target language as faithfully as possible. Anyone who has ever tried to translate a text, though, knows that it is an extremely complex process. More often than not, the aim of conveying the original as faithfully as possible has to be abandoned in favor of pragmatic as well as aesthetic considerations. Thus, translation studies emphasizes the fact that translation is a creative act. Contrary to the common notion that translation only serves as a vehicle, translation studies points out that translations have to be viewed as autonomous works that are independent from the original.³⁵

Indeed, translation requires that a number of decisions be made. Appropriate words and stylistic devices have to be chosen,³⁶ and it has to take into consideration how the culture from which text originates should be represented.³⁷ Translation does not take place in a vacuum. The outcome is strongly influenced by the way the other culture is thought to be and by the way cultural differences are perceived. In the wake of the cultural turn that took place in the 1980s and 1990s, translation studies became, more and more, aware of this situ-

³² See Wiethölter (fn. 32), see also Seckelmann (fn. 24), Frankenberg (fn. 22). For the empirical side e.g. Dann/Hanschmann (Red.), Schwerpunkt Postkolonialismus und Recht, Kritische Justiz, Heft 2, 2012.

³³ But see also Legrand (fn. 13), Ewald (fn. 15) and Geertz, Local Knowledge. Further Essays in Interpretive Anthropology, 1983, 167 ff., using different terms for describing the „deep structure“.

³⁴ Duve (fn. 26), 52 f.

³⁵ Venuti, The Translator's Invisibility, 2nd ed., 2008; Hermans, The Translator's Voice in Translated Narrative, in: Baker (ed.), Critical Readings in Translation Studies, 2010, 193-212.

³⁶ Levy, Translation as a Decision Process, in: Venuti (ed.), Translation Studies Reader, 1st ed. 2000, 148-159; Reiss, Type, Kind, and Individuality of Text: Decision Making in Translation, same volume, 160-171.

³⁷ Especially emphasized by postcolonial translation studies, see e.g. Niranjana, Siting Translation. History, Post-structuralism, and the Colonial Context, 1992.

atedness.³⁸ The idea of faithfulness to the original has been abandoned; instead, the question as to how differences are handled and represented in translation processes has been raised. Postcolonial studies, a field that strongly influenced translation studies over the past two decades, has raised our awareness that cultural exchanges – and translation is always a cultural exchange – cannot be understood as a mere giving and receiving between two closed-off entities. Instead, it points out that cultural exchanges are highly dependent on how the other is conceived and thought of. Moreover, the idea of the other is shaped in the very exchange itself. Identities, perceptions, and roles that are attributed to the other are negotiated in this process; self-perceptions and identities inevitably shift in the course of this process. Postcolonial studies emphasizes that culture has to be understood as something fluid. Nothing would stay exactly the same in the course of an intercultural encounter – on either side. It is a complex processes, in which the borders between the cultures shift, become reshaped and where hybridity is created. Those processes cannot be adequately understood without taking into account, for instance, the contexts in which they respectively take place, prestige and stereotypes, as well as the power structures involved.³⁹

Over the past couple of years, the concept of *translation* has increasingly been used in order to highlight the idea that intercultural contacts do not take place between closed-off, opposing entities. While in translation studies a cultural turn took place, as a result, cultural studies underwent a “translational turn.”⁴⁰ *Translation* has become a key term in describing what happens in intercultural encounters. The concept is, when used in this way, understood in a very broad sense. It is no longer confined to literal translations, but suggests understanding the transfer of practices, symbols, or artifacts also as processes of translation.⁴¹ In doing so, many aspects of the discussion relevant to literal translation might inspire further reflections on processes of intercultural encounters in general. In the arguments that follow, I will be making use of the concept of translation in this broad sense and will examine to what extent the application of this concept for describing intercultural entanglements in the field of law might prove useful.

³⁸ Bassnett/Lefevre, *Constructing Cultures. Essays in Literary Translation*, 1998. See also Venuti (ed.), *Translation Studies Reader*, 1st ed. 2000, 3rd ed. 2012.

³⁹ Castro Varela/Dhawan, *Postkoloniale Theorie*, 2nd ed. 2015.

⁴⁰ Bachmann-Medick, *Translational Turn*, in: *Cultural Turns. Neuorientierungen in den Kulturwissenschaften*, 2009, 238 (239).

⁴¹ See e.g. Lässig (ed.), *Geschichte als Übersetzung?*, *Schwerpunktheft, Geschichte und Gesellschaft* 38 (2012), issue 2.

“Translation” as a Metaphor: Three Impulses

What is the heuristic value of the concept of *translation* used in a broad, metaphorical way? In the following, I am going to trace the ideas of three different authors. In doing so, I will discuss the metaphor’s potential to explore new paths in the studies of legal transfers.

Continua of Transformation: Walter Benjamin

Walter Benjamin, who himself translated a number of texts from French into German, reflected on the activity of translating in his essay “The Task of the Translator” (1921).⁴² Together with an article he had written five years earlier entitled “On Language as Such and the Language of Man”⁴³ this article is fundamental to Benjamin’s philosophy of language. In opposition to a theory of signs and an instrumental understanding of language common at this time, in these two texts he develops his ideas concerning the metaphysical dimension of language.

Benjamin assumes that the aim of translation is not simply to copy the meaning of the original when putting it into the target language. As he sees it, languages are constantly changing. It would be illusory to think that a resemblance between the original and the translation could ever be achieved.⁴⁴ If the aim were indeed to faithfully convey the original’s meaning in another context, it would be impossible to express meaning in the translation that is created in a specific way of saying things or by a specific style.⁴⁵ Trying to be faithful to the original implies a failure to recognize that there is something that is inexpressible in any language. A good translation, according to Benjamin, has to trace this dimension of language.⁴⁶

If it is not the aim of translation to produce similarity and to convey meaning as faithfully as possible in the target language, the question arises as to how the relation between the original and the translation should be understood. His idea was not to conceive both as being completely independent from the other, for Benjamin was convinced that there was indeed a relation between the original and the translation. He emphasized that the original would always be a point of reference for the translation, albeit an ephemeral one. The process of translating demands that a number of decisions be made concerning the logic that is not dependent on the original. Benjamin captures this idea in a catchy simile:

⁴² German Version: „Die Aufgabe des Übersetzers“, published in: *Benjamin*, *Illuminationen*. Ausgewählte Schriften 1, 1977, 50-62. In the following the English translation by Bullock/Jennings will be cited: *Benjamin*, *Selected writings*, Vol. 1 (1913-1926), 1996, 253-263.

⁴³ German Version: „Über die Sprache überhaupt und über die Sprache des Menschen“, published in: *Benjamin*, *Angelus Novus*. Ausgewählte Schriften 2, 1988, 9-26.

⁴⁴ *Benjamin*, (fn. 42), 256.

⁴⁵ *Benjamin*, (fn. 42), 259 f.

⁴⁶ *Benjamin*, (fn. 42), 261.

“Just as a tangent touches a circle lightly and at but one point – establishing, with this touch rather than with the point, the law according to which it is to continue on its straight path to infinity – a translation touches the original lightly and only at the infinitely small point of the sense, thereupon pursuing its own course according to the laws of fidelity in the freedom of linguistic flux.”⁴⁷

Unlike the common idea of translation, in this simile, the translator’s eyes do not wander back and forth between the original and the target language. With the simile of a tangent that follows its own course into infinity after but one touch, Benjamin rather emphasizes that translation follows its own rules. The translation would touch the original in but one “infinitely small point”, and it is not this infinitesimal point that prescribes “the law” according to which the translation should be carried out. Yet, the original is not without meaning for the translation. It is not the point, but rather the very moment of *touching* that sets rules for the translation. These are the rules that pave the “straight path to infinity” on which the tangent continues its course.

What does this mean? It is Benjamin’s idea that the real difference between languages cannot be found in the differences of meaning, but in the difference between certain “ways of meaning.” The moment the tangent touches the original, Benjamin argues, it is possible for one to catch a glimpse of the foreign “way of meaning.” In the very same moment, the idea of faithfulness to the original will be mobilized – an idea that always plays a significant role, even if it will never be realized. That means that the touching of the original has consequences for the translation. However, as Benjamin points out, the consequences are usually different than we assume. Touching the original initiates complex processes in the target language that evolve from the knowledge of foreign ways of meaning, on the one hand, and from the idea of faithfulness, on the other. During the process of translation that follows the moment of touching the original, different ways of meaning may be reflected, and the question arises how foreign ways of meaning could be expressed in one’s own language. This way, the inexpressible becomes visible, and the translator will be encouraged to reflect whether foreign elements should be integrated into one’s own language in order to make the ways of meaning that had been expressed in the original version accessible in the target language. Dealing with the original in this way would lead to a break with the “rotten barriers of one’s own language” and to an extension of this language.⁴⁸ The simile that Benjamin employs shows that these questions have to be addressed within the framework of one’s own language and within its logic – not by circling around the original, but on a tangent that follows its own course after a fleeting touch.

Benjamin’s considerations show that the relation between the original and the translation cannot be fully dissolved, but they also show that this relation is much more complex and, at the same time, more coincidental than generally assumed. Dealing with the original initiates reflections on the meanings and the “ways of meaning,” yet how these reflections develop and

⁴⁷ Benjamin, (fn. 42), 261.

⁴⁸ Benjamin, (fn. 42), 261; illuminating on the empirical level: Howland, *Translating the West. Language and Political Reason in Nineteenth-Century Japan*, 2001.

what questions become relevant at the conclusion of the translation process do not depend on the original. It is rather dependent on factors that originate in the target language and its culture; a sentiment Benjamin expresses when he writes that the tangent pursues “its own course.” Benjamin’s argument is not only concerned with grasping translation as a creative and productive process, it also raises doubts as to whether one could ever gain insights by measuring translations against the standards of the original.

How Newness Enters the World: Homi K. Bhabha

Homi K. Bhabha took up Benjamin’s idea that translation is a productive process and made it his leitmotif. *How newness enters the world* is the heading of a chapter in his book *The location of culture* (1994) in which he deals with questions regarding translation. According to Bhabha, translation is always a process of signification.⁴⁹ The text that is to be translated is inevitably loaded with new meanings. In the new cultural context, it is alienated. Just as Benjamin, he assumes that there is always something foreign and untranslatable in any translation.⁵⁰ A text would never seamlessly become part of the cultural context to which it is translated. In the translation, the foreign will produce rough edges and will remain visible as something that cannot be easily assimilated. Like a stumbling block, it produces friction.⁵¹

The friction produced due to cultural differences is a leitmotif in Bhabha’s understanding of cultural contact. For him, culture is not an entity which has been shaped by following a linear path, but which has always been heterogeneous and dissonant. Culture is produced while engaging with other cultures and is thus subject to constant change. In order to understand the way culture (or rather, cultural difference) works, one has to look at the negotiations taking place at the border. According to Bhabha, these negotiations are nothing but translation processes.⁵² Unlike Benjamin, he does not understand translation mainly as the translation of texts and words. He rather uses the term metaphorically, extending it to all kinds of cultural practices. Understood in this broad sense, translation takes place any time, and it is these sorts of translation processes that produce culture. In Bhabha’s understanding, all cultures have “always been translated,” for culture itself *is* translation.⁵³

Bhabha’s translation concept is rather interesting. By talking about borderline negotiations, he emphasizes not only the fluidity of any intercultural encounter, but also asks about what happens in the very moment of contact. In this way, he draws attention to the translation process itself. In order to localize the borderline negotiations, Bhabha introduces the metaphor of the Third Space, which he describes with the simile of a stairwell:

⁴⁹ Bhabha, *The Location of Culture*, 1994, 225 f.

⁵⁰ Bhabha, (fn. 49), 227.

⁵¹ Struve, *Zur Aktualität von Homi K. Bhabha*, 2013, 100 f.

⁵² Bhabha, (fn. 49), 223.

⁵³ Bachmann-Medick, (fn. 40), 246 f.

“The hither and thither of the stairwell, the temporal movement and passage that it allows, prevents identities at either end of it from settling into primordial polarities.”⁵⁴

The Third Space offers a variety of possibilities. It is possible to meet on one level or another, to climb many steps up or down or make only single small steps. At the same time, the simile of the stairwell shows that two options are not possible. In other words, the encounter is taking place in the stairwell, and this means that both sides have to leave their “own” rooms to meet. The simile points at the fact that maintaining a “pure” own identity would be just as impossible as complete assimilation would be.

What happens in this Third Space, however, cannot be described as a simple *mélange* of cultures that takes place on one step of the stairwell or another. Rather, something hybrid is created. The tension between the cultures will be maintained and will produce not a new homogeneity but a “heterogeneous conglomerate” consisting of elements that are “indissoluble.”⁵⁵ Everything new that is created is created out of the rough edges of hybridity, out of the friction existing in hybrid spaces.⁵⁶ Accordingly, hybridity is a space of translation, which means nothing other than a “heterogeneous space for discourse.”⁵⁷

With his concept of cultural translation, Bhabha left the framework of a language-focused idea of translation and suggests a concept that goes far beyond language and text. Just like Benjamin, he assumes that translation is not a simple, commensurable act. He, too, emphatically stresses that something new is created during the process of translation. Whereas Benjamin, by employing the metaphor of the tangent that touches the circle, emphasizes the independence of translation regarding the original, Bhabha highlights another aspects: With the metaphor of the Third Space he focuses on the interaction between different actors. It is within the Third Space that negotiations take place, identities and positions are shaped, and self-perceptions and patterns of thinking are defended and transformed. These negotiations do not take place within the dichotomy of the original and target language: The moment of the first contact, the moment when discourse is entered into is a moment that already changes both cultures. They cannot face each other untranslated. With this idea, Bhabha dissolves the dichotomy between original and translation.

Translation without a Universal Tertium: Dipesh Chakrabarty

Over the last two decades, postcolonial studies has intensely dealt with questions concerning translation. There are substantial reasons for this. Translations were one instrument used to reshape traditional epistemologies in colonial regimes. Cultures were all too often represented in a way that was influenced by the colonial view. Postcolonial studies analyses how translations up till now reproduce these views, stereotypes, and perceptions. At the same

⁵⁴ Bhabha, (fn. 49), 4.

⁵⁵ Struve (fn. 51), 101.

⁵⁶ The Third Space, Interview with Homi K. Bhabha, in: Jonathan Rutherford (ed.), *Identity: Community, Culture, Difference*, 1990, 211.

⁵⁷ Bachmann-Medick, (fn. 40), 250.

time, they suggest translation models that aim at breaking with this problematic tradition. This is precisely what Dipesh Chakrabarty attempts to do in his reflections on translation. He claims that the idea of a universal tertium capable of conveying the original language into the target language should be abandoned. Instead, translation should be thought of as an act of negotiation between two experiential worlds:

“It is, in fact to appeal to models of cross-cultural and cross-categorical translations that do not take a universal middle term for granted. The Hindi *pani* may be translated into the English ‘water’ without having to go through the superior positivity of H_2O .”⁵⁸

According to Chakrabarty, translating always means creating a link between a foreign world of experience and one’s own. As an example of a translation that does not pretend to be mediated by a universal tertium, he refers to a classical religious text explaining Islam by using Hindu deities written in Bengal during the 18th century:

“Dharma who resided in Baikuntha was grieved to see all this. He came to the world as Muhammadan ... [and] was called Khoda ... Brahma incarnated himself as Muhammad, Visnu as Paigambar and Civa became Adamfa (Adam).”⁵⁹

Chakrabarty argues that the idea of a tertium mediating between languages is nothing but a fiction. It is misleading and implies that there is a universal core of meaning that makes translation possible without losses or difficulties. Such an assumption, Chakrabarty states, is dangerous. Meanings that exceed the imagined universal core would be relegated to the status of obscurities tied to the respective culture.⁶⁰ Giving up this fiction, as the cited Bengal text does, enables a direct mediation between the worlds of experience. Chakrabarty argues that we should not be fixated on the problem of complete translatability, for it is a problem that cannot be solved. He prefers to take an alternative path: By not pretending that meaning could remain uncorrupted during the process of translation, the “scandal of translation” becomes visible, at least for those who are sufficiently proficient in both languages to understand how meaning has been reshaped during the translation process.⁶¹

Not only with regard to these ethical considerations is Chakrabarty’s understanding of translation of particular interest. It seems that the idea of negotiation between two worlds of experience describes much more precisely what happens during a translation process than the model of conveyance through universal ideas. Chakrabarty’s translation model pays attention to the fact that the foreign is always perceived from certain perspectives, which means that the perception is always context-based and related to experience. This perspective influences what is understood of the foreign, what parts of it are regarded as worth to be translated and how the foreign is depicted in the translation. By pointing this out, Chakrabarty draws attention to the fact that what the original is, depends on the translator’s imagination.

⁵⁸ Chakrabarty, *Provincializing Europe. Postcolonial Thought and Historical Difference*, 2000, 83.

⁵⁹ Quoted by Chakrabarty, (fn. 58), 82 as in Chandra Sen, *History of Bengali Language and Literature*, 1911, 36 ff.

⁶⁰ Chakrabarty, (fn. 58), 86.

⁶¹ Chakrabarty, (fn. 58), 89.

This is what cultural studies means when talking about “translation without original”⁶² – an idea that has to be considered when analyzing translation processes.

Possibilities for Studies of Legal Transfer

I am now coming to the question of how the concept of translation can be used in a fruitful manner for studies of legal transfers. If understood in a narrow sense like lingual translation, the usefulness of this conception will be limited. Usually linguistic translation is part of the process of legal transfer; however, this is always only one element in a process that is much broader. Considering this broader process, what can we gain by taking up the ideas of Benjamin, Bhabha, and Chakrabarty? Will they help us to obtain a more profound understanding of the process of legal transfers?

1. Taking up the ideas of Benjamin, Bhabha, and Chakrabarty enables us to analyze in a nuanced manner the relation of the original and the translation; in doing so, it gives us an insight into the relation of the laws of the *giving* and *receiving* countries. Benjamin’s simile of the tangent touching the circle shows that the original, i.e., the foreign law that is sometimes voluntarily taken up, sometimes forcefully imposed, of course, has a certain impact on the law that is to be created. At the same time, the simile shows the process that occurs when taking up foreign law is not necessarily orientated towards the law that served as a model. The process, once initiated, follows its own course and its own rules. What is created in the new cultural context is in and of itself something new. By sticking to a research tradition that only aims to locate influences and measures similarities, this aspect remains invisible. Newness will be recognized only if differences and originalities are closely examined.

Such an approach enables us to pose questions that do not arise when research is solely dedicated to the search for “influences.” For instance, it is not considered strange or unusual that legal scholars from non-European countries, whose legal systems were influenced by European elements in the 19th century, are still very much preoccupied with the current developments in and comparisons with European law. Here, the image of the tangent invites us to ask why this is the case. There might indeed be a number of good reasons for having stayed in contact with the law that served as a role model; nevertheless, the fact that this law once served as a model does not sufficiently explain this continued involvement. In other words, the transfer alone does not serve as explanation for this phenomenon. Rather, it is a decision that has to be constantly affirmed and that can only be understood by looking at the context in which it *was* and *is* made.

⁶² *Bachmann-Medick*, Die Übersetzungsbrücken sind einsturzgefährdet, in: *Humboldt* (Zeitschrift des Goethe-Instituts), Online issue May 2010, <http://www.goethe.de/wis/bib/prj/hmb/the/153/de6074307.htm>.

2. At the same time, Benjamin, Bhabha, and Chakrabarty's approaches call attention to the fact that processes of legal transfer cannot be understood in their entire complexity unless one takes a look at the actors and institutions involved, for they are the ones making the decisions and shaping the transfer process. Which elements of the foreign law will be incorporated and which will not? How should they be communicated to the courts? What kind of additional information would be necessary in order to make the legal order function? Just as in a process of linguistic translation, numerous decisions have to be made, and all of these questions have to be actively answered in the transfer process. Sometimes the actors agree on the questions, sometimes they do not. Negotiations will take place. Analyzing the power relations existing between the actors will be necessary: Who is suggesting what? Which intentions and motives are behind it? What kind of and how much resistance will a decision face? Taking a look at the actors and the lines of conflict they operated in enables us to go beyond official statements and to gain a deeper understanding as to what this process of legal transfer was all about—namely, in the economic, political (in foreign and domestic affairs alike), cultural, and symbolic spheres as well.

However, it is important to note that processes of legal transfers are not only influenced by actively made and conscious decisions. Here, Bhabha's idea of the Third Space proves to be helpful. It is an idea that illuminates the role of the bridgeheads of transfer processes. These are usually political and intellectual elites, who speak foreign languages, and who travel and act as negotiators of the foreign in their own country. They have a direct and immediate encounter with the 'foreign.' Based on this impression, they translate both in a literal and figurative sense. With the simile of the Third Space, Bhabha indicates that with each step they take along the *stairwell*, their perception of the foreign and their own home changes. In more juridical terms, the structures of their legal thinking, their ideas about what law can and should do, about how law may and should function, as well as its application, shift with every step they take when encountering the foreign law. Their self-perception changes and with it, so too their expectations towards the transfer process. Taking up Chakrabarty's argument, this means not only that the active decisions they make but also the constant shift of their perspective, perception, and way of thinking is crucial to understanding why a transfer process takes place in the way it does.

3. The ideas of the three authors call our attention to the benefits of analyzing transfer processes, not primarily by asking for their results, but by closely examining their processuality. They point out that it is a process consisting of active decisions as well as unconscious shifts in patterns of thinking and acting. Both elements are interplaying in a complex process of transformation. It is the transformations that have to be carefully analyzed. They show how new structures of legal thinking come about, how new understandings of law, and new practices attached to it arise. If we are interested in better understanding the structures of thinking and practices of law that become characteristic of the new legal system, then we need to look more closely at the transformation process itself. In doing so, we will also better grasp *why* this was the case.

The changes that take place concern the bridgeheads as well as those who only indirectly come into contact with the foreign law. While the former are often acquainted with the foreign law, its universe of ideas and its practice via first-hand observation, for the latter the act of implementing foreign law might seem like some kind of grapevine or messenger game: Lacking any direct contact to the foreign sources and environments, they are dependent on the translations and explanations of others. In the beginning, their understanding of the way the new law works will be blurry and their ideas about how it should be applied vague. This will change only over time, often not in a linear and continuous manner, but rather as a gradual process of transition. In order to understand what happens during this process, it will be illuminating to have a close look at the way the different layers of law are affected by the changes.

4. The “slow processes of amalgamation” Hirsch mentioned in his critique of the comparative legal research of his time can hardly be described as a linear give-and-take. Rough edges will always remain, and the incorporation of foreign law can come at a price. These edges often result not only from the differences existing between the two legal cultures, but they are also produced by the transfer process itself, by the negotiations, forms of resistance, adaptations, and by the tenacity of the old patterns of thinking. Bhabha points at this when describing translation as a negotiation at the borderline between two cultures.

5. The metaphor of translation offers a heuristic that enables us to pose questions that are currently not at the center of the research concerned with legal transfers. However, these questions prove to be instructive when it comes to understanding how legal transfer works. The metaphor invites us to look at the actors, their perspectives, their understandings, their patterns of thinking, and their decisions, not to mention at the processuality of the transfer process itself. It offers an approach enabling us to not only gain an understanding of the complexity of transfer processes, but also for us to grasp how this process is shaped by the interplay of active decisions, subtle shifts, and internal dynamics. It makes it possible for us to point out the contradictions and fault lines inherent to the process as well as to examine their effects on law and on its role in society. In the end, all of these insights enable us to ascertain how the process of transfer is inscribed into the newly implemented law. In short: The metaphor of translation proves to be helpful in gaining a deeper understanding of the way(s) how legal transfers function. Hasty conclusions concerning the success or failure of a transfer process will prove to be an obstacle for research directed toward this aim.

Perspectives in Legal History: Transnational Interrelations

These ideas regarding the phenomenon of legal transfers have been inspired by cultural studies and by debates in the field of general history. Facing the challenges of globalization and

transnationalization, intercultural exchanges have, over the course of the last decade, been intensely studied and discussed from a historical perspective as well as with regard to methodological implications. Terms like *global history*, *transnational history*, *entangled history*, or *histoire croisée* mark out the field of knowledge that has developed.⁶³ The diverse approaches to developing a historiography “beyond the nation state”⁶⁴ are driven by the idea that history can no longer be understood as taking place between encapsulated spaces and entities. They aim at drawing a more sophisticated picture by emphasizing that knowledge, values, and practices have been developed in constant exchange between cultures and spaces. Disjunctions and divergent interests are analyzed in these studies as well as internalizations and strategies of appropriation.

These approaches are currently being taken up by legal history.⁶⁵ Here they have proven to be of particular interest as the creation of law has all too often taken place under cross-cultural influences – not only in modernity. Books on law and scripts written by legal scholars circulated between cultures and continents, they were translated, read, and passed on. The European *ius commune* and canon law were transferred to countries outside of Europe in the course of missionary activities and colonialism, being reshaped and transformed by local practices.⁶⁶ The idea of the universality of certain concepts of law was formed in the transatlantic exchange of constitution-making processes that took place around 1800.⁶⁷ Finally, international law spread during the 19th century through the translation of key works and was taken up by non-European states, often in a way that aimed at strengthening one’s own position within the international community.⁶⁸ All these historical moments not only offer excellent material for thinking about how transfer processes work, but they also tell us a great deal about European law, how it acquired the position it has today,⁶⁹ and how the notion of

⁶³ Conrad/Eckert, *Globalgeschichte*, 2007; Pernau, *Transnationale Geschichte*, 2011; even earlier Werner/Zimmermann (eds.), *De la comparaison à l’histoire croisée*, 2004. The term „cultural translation“ was introduced and contextualized in historical science by Burke, see: *id.*/Hsia (eds.), *Cultural Translation in Early Modern Europe*, 2007; *id.*, *Lost and found in Translation. A Cultural History of Translators and Translating in Early Modern Europe*, KB Lecture, Netherlands Institute for Advanced Study in the Humanities and Social Sciences, 2005.

⁶⁴ Osterhammel, *Geschichtswissenschaft jenseits des Nationalstaats. Studien zu Beziehungsgeschichte und Zivilisationsvergleich*, 2001.

⁶⁵ Duve (fn. 26); see also contributions in: *id.* (ed.), *Entanglements in Legal History: Conceptual Approaches*, 2014.

⁶⁶ See e.g. Danwerth, *Paullu Inca und seine Erben: Letztwillige Verfügungen inkaischer Eliten in den frühkolonialen Anden*, in: Herzog/Hollberg (eds.), *Seelenheil und irdischer Besitz*, 2007.

⁶⁷ See Fernández Sebastián (ed.), *Diccionario político y social del mundo iberoamericano. Conceptos políticos fundamentales, 1770-1870*, Vol. 1: 2009; Vol. 2: 2014.

⁶⁸ Keller-Kemmerer/Fiocchi Malaspina, *International Law and Translation in the 19th century*, in: Rg 22 (2014), 214-226; on Asia, see e.g.: Cassel, *Grounds of Judgement*, 2011; Kroll, *Normgenese durch Re-interpretation. China und das europäische Völkerrecht im 19. und 20. Jahrhundert*, 2012; Zachmann, *Völkerrechtsdenken und Außenpolitik in Japan, 1919-1960*, 2013. See also contributions in: Vec/Nuzzo (eds.), *Constructing International Law. The Birth of a Discipline*, 2012.

⁶⁹ Duve, (fn. 26).

a universal core of law was, historically speaking, able to emerge. They explain why we are having difficulties thinking of law beyond this core even today.

Translation is Complicated – and so is Legal Transfer

This observation goes far beyond the methodological questions that were discussed in this article. Unfortunately, I do not have the time to go into further detail here. In any case, it is no coincidence that the field of legal history is currently providing impulses when it comes to research on legal transfer. Legal history has always been concerned with the necessity of looking at processualities and contextualizing the subject matter at hand – just as I have suggested for the research on legal transfers in this paper. Hirsch, too, claimed that the reception of foreign law should be examined as a multi-stage, multi-layered social process. His method of choice was a socio-legal approach. Only by considering the “social forces behind the law that resist its application” and by considering “the immaterial and material social milieu,” can the investigation of transfer processes be of “scientific importance and practical value.”⁷⁰ It was evident to Hirsch that the transformation that becomes visible would be complicated. And, of course, the metaphor of translation does not simplify the matter. After all, “Translation is complicated,” as Simone Glanert and Pierre Legrand once wrote in an essay on “Law in Translation.”⁷¹ Perhaps this is what makes the concept of *translation* so fruitful.

⁷⁰ Hirsch, (fn. 4), 120.

⁷¹ Glanert/Legrand, Foreign Law in Translation: If Truth Be Told..., in: Freeman/Smith (ed.), Law and Language, 2013, 513 (517).